IN THE UNITED STATES SUPREME COURT
OCTOBER TERM 1989
CASE NO. 89-5961

ROBERT LACY PARKER,

Petitioner,

v.

RICHARD L. DUGGER,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE ELEVENTH CIRCUIT COURT OF APPEALS

BRIEF OF RESPONDENT

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QUESTIONS PRESENTED FOR REVIEW

(Restated)[1]

I. Is the application of Florida's jury override standard in an individual case subject to Eighth Amendment review, and, if so, what standard of review is applicable?

II. Is a constitutional claim procedurally barred if it is not raised on direct appeal or in any collateral or post-conviction proceeding in the state and federal trial courts?

III. Where the jury was permitted to convict Petitioner of first degree murder under either a felony murder or premeditated murder theory, and where

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[1] The Petitioner's questions, as stated in his brief, differ from the questions set forth in his petition for writ of certiorari. The Respondent has restated the questions to bring the issues into line with the petition. In addition, Mr. Parker has affirmatively abandoned the fifth claim asserted in his original petition.

"duress" is not a recognized defense to murder, is it harmless error to disallow a defense requested jury instruction on duress?

IV. May a prosecutor whose cross-examination of the defendant is interrupted by a recess subsequently question the defendant about his consultation with his attorney during the recess?

TABLE OF CONTENTS

TABLE OF CONTENTS
(Continued)

TABLE OF AUTHORITIES

STATUTES AND CONSTITUTIONS

OTHER AUTHORITES

OPINIONS BELOW

The Petitioner's statement is accepted.

STATEMENT OF JURISDICTION

It is submitted none of the reviewing questions upon which Parker seeks certiorari review require further review. Respondent would submit summary affirmance is mandated or a determination that certiorari review was improvidently granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Petitioner's statement is accepted. The Respondent would add the following:

(1) This case involves the application of 28 U.S.C. §2254, a copy of which is attached.

(2) Florida Rule of Appellate Procedure 9.330(a) states, in relevant part:

A motion for rehearing or for clarification of decision may be filed within 15 days of an order or within such other time set by the court. The motion shall state with particularity the points of law or fact which the court has overlooked or misapprehended. The motion shall not re-argue the merits of the court's order. A reply may be served within 10 days of service of the motion.

STATEMENT OF THE CASE

Mr. Parker's statement of the facts is not acceptable. Therefore, the following pertinent facts are provided to clarify those circumstances before the Court.[2] The Respondent relies upon the facts as reported by the Eleventh Circuit (J.A. 147, et.seq.), to-wit:

> This case involves three murders committed in Duval County, Florida on February 6-7, 1982. Parker, then a drug dealer, was known to have a violent temper and to possess several firearms. The day the murders began, Parker became irritated because many of his customers were not paying their accounts. He decided to reinforce his reputation as a tough dealer and began by throwing a rope over a tree limb and threatening to hang Tommy Groover, one of his distributors, if the

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[2] Parker submits undisputed facts in his brief which do not accurately reflect the facts as discerned by the Court of Appeals or reflect their full content based on the trial record.

debts were not paid. The next day Parker again threatened to kill Groover if he did not recover the money. Taking Parker at his word, Groover set out with Billy Long, another of Parker's acquaintances, to collect some of the debts. They first stopped at a local nightclub. There they found Richard Padgett, who was behind in his drug debts, with his girlfriend Nancy Sheppard. The two men persuaded Padgett and Sheppard to accompany them to Parker's trailer, where Parker and his ex-wife, Elaine Parker, were waiting.

When the group arrived at the trailer, Parker took Padgett outside for a 'discussion.' A shot was fired. When the two came back inside, Parker had a pistol in his belt. Sheppard became alarmed and offered her necklace and ring to Parker as payment for Padgett's debt. Parker refused Sheppard's offer; instead, Long drove her home. The rest of the group accompanied Padgett as he tried to collect money to pay his debt. When he was unsuccessful, Padgett was taken to a junkyard owned by Parker's father. At the junkyard, Groover beat

Padgett. Thereafter, the group drove to a secluded rural area. The three men exited the car and Padgett fell to his knees and begged for mercy. With Parker's aid, Groover shot Padgett to death and Parker and Groover threw his body in a ditch.

Parker, Groover, and Elaine cleaned up at the junkyard and drove to a bar where they met Jody Dalton, Groover's former girlfriend. Ms. Dalton decided to accompany them. The group first stopped to throw the murder weapon into a river. Dalton witnessed this act. Next, they returned to Parker's trailer and dropped Dalton off while the rest of the group drove to the residence of Joan Bennett. When they returned with Ms. Bennett, Parker became angry because Dalton had used some of his drugs without his permission. Parker and Groover decided to 'get rid' of Dalton and drove the entire group to an area known as Donut Lake. There Dalton was stripped, taunted, beaten, and kicked as she begged for mercy. Groover, again with Parker's aid, shot Dalton to death. The two men tied up her body with rope and concrete blocks and threw it into the lake.

During the trip back, Parker and Groover discussed killing Bennett because he had witnessed the Dalton murder. Elaine convinced the two men that Bennett could be trusted and they drove Bennett home. The three concluded, however, that Sheppard could link them to Padgett's murder and decided to kill her. They first found Long, who directed them to Sheppard's home. Elaine then tricked Sheppard into accompanying the group by telling her that Padgett was 'high' and wanted to see her.

The group soon arrived at the scene of the Padgett murder. Parker took Long to the ditch and asked him if he knew what was going on. When he replied that he did not, Parker told him that 'either you kill Nancy or I will kill you.' Next, Parker took Sheppard to the ditch. Upon seeing Padgett's body, she fell to the ground and exclaimed 'Oh, my God!' Elaine handed Long a pistol and said, 'You better do it or he'll kill you too.' Long took the pistol and shot Sheppard in the head. Parker and Groover screamed, 'Shoot her again, she's still

breathing.' Long shot her twice more. Parker then cut her throat with a knife and took her necklace and ring.

Additional factual averments require clarification.

Groover was collecting drug debts specifically so he could pay money to Parker. (J.A. 148).

When Groover shot Jody Dalton, he (Parker) shouted "What are you doing you crazy m____ f_____?". This comment, however, taken in context, was an expression of concern by Parker over the noise being made by Groover (and the danger they would get caught), not concern over the fate of Ms. Dalton.

After Elaine Parker lured Nancy into their car, Parker told Nancy that Richard Padgett wanted to see her. When they arrived at the murder scene, Parker asked Long if he knew what was going to happen. When Long said he did not,

Parker laughed and told Long that he would soon find out. Parker, who had previously shot Long and thus scared him, ordered Long to shoot Nancy or get killed along with her. Long shot Nancy and then Parker personally slit Nancy's throat. Parker then took Nancy's ring and necklace. Parker also cleaned off the knife.

Mr. Parker raises four specific issues, the facts relevant to each being as follows:

Facts: Issue I

The issue addressed by the Eleventh Circuit was not the propriety of the Florida Supreme Court's override decision but, rather, whether a federal district court judge could substitute his own sentencing override decision for that of the state courts (J.A. 157). The court held:

> The district court decision suggests that its grant of relief was influenced by dissatisfaction with the Florida Supreme Court's application of the **Tedder** standard to the facts in this case. **Spaziano** warns, however, that federal review for the arbitrary or discriminatory imposition of the death penalty must not devolve into second guessing the Florida courts on questions of state law, particularly on whether the trial judge complied with the mandates of **Tedder**.

In sentencing Parker to death for the Sheppard murder, the trial judge considered all statutory and non-statutory mitigating evidence (J.A. 158). The judge found no mitigating circumstances but found the following aggravating factors:

(1) Parker's prior conviction for a violent felony.

(2) The murder was committed during a robbery.

(3) The murder was committed to avoid arrest.

(4) The murder was committed for pecuniary gain.

(5) The murder was heinous, atrocious and cruel.

(6) The murder was cold, calculated and premeditated.

In upholding the trial court's override after careful review pursuant to the state law standards of **Tedder v. State**, 322 So.2d 908 (Fla. 1975), the Florida Supreme Court struck factors (2) the murder was committed during a robbery, and (5) the murder was heinous, atrocious and cruel.

The mitigation offered by Parker was:

(1) Parker's mother testified that Parker had a normal childhood, he was the baby of the family, and that he was spoiled. The family was close knit.

Parker's father drank but was never mean to the children, and left any discipline to her. She also testified that Parker was using dope by the time he was fifteen, and that Parker broke her arm when she tried to stop him from fighting with his brother.

(2) Parker's grandmother also testified to his normal childhood.

(3) Parker's sister testified that Parker caused his mother a lot of trouble once he began abusing drugs and had to be placed in a juvenile home.

(4) Parker offered two other character witnesses and an evangelist's testimony that Parker "found God".

(5) Parker offered evidence of Groover's death sentences for killing Padgett and Dalton.

The state courts did not specifically address the specifics of this non-

statutory mitigation but, the Eleventh Circuit addressed this evidence by noting that the weight to be afforded this evidence was a state court decision and that mere silence would not be interpreted as a failure to consider the evidence. (J.A. 159-160).

Facts: Issue II

During trial, Parker requested a jury instruction on the "independent intervening act" defense to felony murder. The trial court did not grant the request but gave standard jury instructions on felony murder which substantially covered the subject.

On direct appeal, Parker modified his argument to suggest that he was "not allowed" to argue certain defenses to the jury due to the court's rejection of his instructions. The Florida Supreme Court disposed of the issue by finding

the lack of record evidence supporting any "independent act" instruction. (J.A. 66).

Parker moved for rehearing, including in his motion a de novo allegation that the evidence of felony murder was insufficient, stating:

> This Court, in page 6 of its own opinion, ruled that there was no felony involved in the Sheppard murder and struck felony murder as an aggravating circumstance. The lower court was therefore incorrect in instructing the jury on felony murder.

(J.A. 82).

The Florida Supreme Court denied rehearing in a summary order without issuing a written opinion. (J.A. 87).

When Mr. Parker filed his habeas corpus petition in federal court, the argument regarding the "failure" to give the requested jury instruction on "independent act" was transformed into a

claim that the evidence at trial was "insufficient" to support a felony murder instruction. To overcome the application of procedural bar to this claim, Parker argued:

> The fact that the defendant was convicted based upon erroneous jury instructions that were unsupported by the evidence, and the contention that this violated due process, were clearly raised in the Defendant's Motion for Rehearing in the Florida Supreme Court. This was an issue that could not have been raised earlier because it was not ripe for review until the Florida Supreme Court issued its opinion finding the evidence of the felony murder aggravating circumstances was insufficient.

The federal district court found Parker's claim to be procedurally barred (J.A. 103).

Parker appealed to the Eleventh Circuit, but again mutated his claim into the argument that his "felony

murder conviction" was erroneous under **Stromberg v. California**, 283 U.S. 359 (1931).

The Eleventh Circuit noted that the "**Stromberg**" approach was not argued at trial, on appeal, or even in the federal district court (J.A. 162). To the extent that the felony murder issue in general was being argued, the court relied on Parker's admission that he did not raise the issue until he filed for rehearing in the Florida Supreme Court (J.A. 163), and determined the claim was procedurally barred (J.A. 163).

Facts: Issue III

Although "duress" is not a defense to murder in Florida, Parker requested a "duress" instruction at the close of trial. Parker provided no relevant legal authority for his request, and his request was denied.

The Eleventh Circuit noted that Parker was prosecuted under a premeditated murder theory as well as a felony murder theory (J.A. 167). The Eleventh Circuit found that Parker's "duress" instruction was misleading because it implied that duress was also a defense to premeditated murder (J.A. 167). Thus, the Eleventh Circuit said, the trial court did not err by refusing to give an incorrect instruction (J.A. 167).

Facts: Issue IV

The trial court interrupted the State's cross-examination of Parker due to the arrival of the jury's supper. Parker took advantage of this break to confer with his attorney. The State questioned Parker as to what was discussed with his counsel during the break. Defense counsel objected to this

inquiry. Parker's counsel had questioned State witnesses in the same manner.

Collateral relief was denied by the lower federal courts on the authority of **Geders v. United States**, 425 U.S. 80 (1976). On appeal, the Eleventh Circuit upheld the district court with a single citation to **Geders**. (J.A. 169-170).

SUMMARY OF ARGUMENT

It is submitted that certiorari review may have been improvidently granted to review procedurally barred claims and issues of state, rather than federal, law.

Regarding Mr. Parker's first point, the Respondent submits that the Eleventh Circuit did not err in following the dictates of **Spaziano v. Florida**, 468 U.S. 447 (1984). Federal courts, even if convinced that a state has misapplied its own law in passing sentence, simply lack the authority to substitute their own sentencing decisions for those of the state courts. **Lewis v. Jeffers**, ____ U.S. ____, 111 L.Ed.2d 606 (1990); **Barclay v. Florida**, 463 U.S. 939 (1983).

Mr. Parker's second issue seeks federal abolition of Fla.R.App.P. 9.330, which precludes appellants from arguing

issues in a motion for rehearing which were not raised on appeal. Mr. Parker cannot support his request with any relevant law.

The third issue is a request for this Court to recognize "duress" as a defense to murder in the state of Florida, thus compelling jury instructions on said defense. Again, Parker offers no support for the proposition that certiorari should be used to this end.

The fourth issue seeks reversal of this Court's controlling decisions in **Geders v. United States**, 425 U.S. 80 (1976), and **Perry v. Leeke**, 488 U.S. ____, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), apparently under a theory that the State does not have the right to cross examine a witness, including a defendant, on the issue of "coaching".

ARGUMENT

ISSUE I

THE FLORIDA SUPREME COURT'S "TEDDER RULE" FOR REVIEWING JURY OVERRIDE DEATH SENTENCES IS A RULE OF STATE LAW NOT SUBJECT TO FEDERAL REAPPLICATION

The Petitioner, Robert Parker, contends that Eighth Amendment and general due process concerns require federal courts to resentence state prisoners whenever they detect a misapplication of state law by said state courts. Since Mr. Parker's position is completely at odds with established decisional law governing §2254 litigation, it is submitted he cannot prevail.[3]

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[3] Parker's brief includes a **de novo** claim of misapplication of Florida's "**Elledge** Rule" (governing cases where non-statutory aggravating factors are relied upon). **Elledge v. State**, 346 So.2d 998 (Fla. 1977). No such error occurred in this case. Moreover, misapplication of **Elledge** would not

The idea that federal judges either can or should resentence state prisoners under their own personal interpretation of state law was rejected in **Gryger v. Burke**, 334 U.S. 728, 731 (1948). In refusing to reapply Pennsylvania law, this Court said:

> It is neither clear that the sentencing court so construed the statute, nor if he did that we are empowered to pronounce it an error of Pennsylvania law. . . . And in any event it is for the Pennsylvania courts to say under its law what duty or discretion the court may have had. Nothing in the record impeaches the fairness and temperateness with which the trial judge approached his task. His action has been affirmed by the highest court of the Commonwealth. We are not at liberty to conjecture that

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compel relief. **Barclay v. Florida**, 463 U.S. 939 (1983). Parker's citation to **Dobbert v. Florida**, 432 U.S. 282 (1977), is misplaced, since Dobbert only reviewed the "**ex post facto**" application of Florida law.

> the trial court acted under an interpretation of the state law different from that which we might adopt and then set our own interpretation as a basis for declaring that due process has been denied. We cannot treat a mere error of state law, if one occurred, as a denial of due process; otherwise, every decision by a state court on state law would come here, as a federal constitutional question.

This principle was carried forward in **Lewis v. Jeffers**, 497 U.S. ____, 111 L.Ed.2d 606, 623, 624 (1990), where the Court, after quoting the admonition in **Godfrey v. Georgia**, 446 U.S. 420, 450 (1980), that federal courts should not "peer majestically over the [state] court's shoulder so that [they] mighty second guess its interpretation of facts . . .", held:

> Moreover, a federal court should adhere to the Jackson standard even when reviewing the decision of a state appellate court that had

> independently reviewed the evidence, for the underlying question remains the same: If a State's aggravating circumstances adequately perform their constitutional function, then a state court's application of those circumstances raises, apart from due process and Eighth Amendment concerns, only a question of the proper application of state law. A state court's finding of an aggravating circumstance in a particular case -- including a de novo finding by an appellate court that a particular offense is "especially heinous . . . or depraved" -- is arbitrary or capricious if and only if no reasonable sentencer could have so concluded. Indeed, respondent agrees that "a state court's 'especially heinous . . . or depraved' finding, *insofar as it is a matter of state law*, is reviewable by the federal courts only under the 'rational factfinder' rule of Jackson v. Virginia." Brief for Respondent 95-96 (emphasis added; footnote omitted).

In **Spaziano v. Florida**, 468 U.S. 446 (1984), this Court, after upholding the constitutionality of Florida's jury

override procedure, absolutely refused to grant to Spaziano any review of the specific application of the "**Tedder** Rule" in his case. As the court recognized, jury sentencing is not required by the Constitution, so any decision to override a jury's non-binding, non-constitutional sentencing suggestion does not open the gates to federal review. **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1989).

In this regard, it should be noted Justice Scalia's concurring opinion in **Walton v. Arizona**, 497 U.S. ____, 111 L.Ed.2d 511, 539 (1990):

> Moreover, the Eighth Amendment's prohibition is directed against cruel and unusual **punishments**. It does not, by its terms, regulate the procedures of sentencing as opposed to the substance of punishment. As the Chief Justice has observed, '[t]he prohibition of the Eighth Amendment relates to the character of

> the punishment, and not to the process by which it imposed.' **Gardner v. Florida**, 430 U.S. 349, 371 (1977) (Rehnquist, J., dissenting). Thus, the procedural elements of a sentencing scheme come within the prohibition, if at all, only when they are of such a nature as systematically to render the infliction of a cruel punishment 'unusual'.

Applying this approach to Mr. Parker's case, the records shows the trial judge, as sentencer, weighed very significant (statutory) aggravating sentencing factors against **de minimus** mitigating evidence.[4]

The trial court's application of Florida law was carefully reviewed by

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[4] Note Justice Scalia's concurrence in **Walton, supra**. Unlike defendants who claim poverty or ill health as "mitigation", Parker was a well-cared-for (even spoiled) child who enjoyed a normal childhood and who suffered from no mental disorders. Parker's other mitigation was that he had become religious.

the Florida Supreme Court under its judicially crafted "**Tedder** Rule". **See Tedder v. State**, 322 So.2d 908 (Fla. 1975). The Florida Supreme Court found that the facts supporting Parker's sentence were indeed so clear and convincing that no reasonable person could differ. (J.A. 71). Thus, as concluded in **Spaziano, supra**, the Florida Supreme Court's constitutionally acceptable review of capital cases was accepted and the particularities of the facts as to whether death was the appropriate sentence must be left to the Florida court to resolve as it did. Nothing in this record requires a retreat from **Spaziano**. **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1989).

What Mr. Parker seeks is a major expansion of §2254 at a time when

Congress and this Court are calling for restraint and reform.

The history of §2254, of course, has been marked by repeated expressions of support for the concepts of comity and federalism. **See Rose v. Lundy**, 455 U.S. 509 (1982); **Wainwright v. Sykes**, 433 U.S. 72 (1977); **Engle v. Isaac**, 456 U.S. 107 (1982).

Since 28 U.S.C. §2254 is merely a statutory creation, it is limited by the Constitution and cannot be applied in a manner violative of any constitutional provision. **Schneckloth v. Bustamonte**, 412 U.S. 218 (1972); **Murray v. Giarratano**, ____ U.S. ____, 106 L.Ed.2d 1 (1989); **Pennsylvania v. Finley**, 481 U.S. ____, 95 L.Ed.2d 539 (1987); see also Bator, **Finality in Criminal Law and Federal Habeas Corpus for State Prisoners**, 76 Harvard Law Review, No. 3 (1963).

Parker does not challenge the constitutionality of Florida's jury override "system" as unconstitutional under the Eighth Amendment. Indeed, he confesses that its constitutionality has been upheld. **Proffitt v. Florida**, 428 U.S. 242 (1976); **Spaziano v. Florida**, 468 U.S. 4446 (1984). **Hildwin v. Florida**, 490 U.S. ____, 104 L.Ed.2d 728 (1986); **Barclay v. Florida**, 463 U.S. 939 (1983). His complaint, similarly, does not challenge the death penalty itself or allege that it is "systematically" misapplied. What Mr. Parker says is that he disagrees with the Florida Supreme Court's sustaining of his death sentence on direct appeal, and he demands federal resentencing, or a second appeal, with the federal court reapplying state law.

It is abundantly clear that Mr. Parker's request is contrary to the settled law governing the scope of §2254 review and, the Eleventh Circuit was correct in recognizing this effort and rejecting it as erroneous. Parker is not entitled to relief. (J.A. 157-158).

ISSUE II

THE COURT OF APPEALS DID NOT ERR IN HOLDING THAT PETITIONER'S "STROMBERG" CLAIM WAS PROCEDURALLY BARRED

Mr. Parker strives mightily to create the illusion that his "**Stromberg**"[5] claim was (1) either argued below and in state court, or (2) was preserved in a de facto sense by the Florida Supreme Court.

Parker's argument on direct appeal to the Florida Supreme Court went to the denial of a jury instruction, not to the concept of "felony murder" or "general versus specific verdicts". On rehearing, Parker briefly questioned the sufficiency of the evidence, but again he did not argue any even remotely

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[5] **Stromberg v. California**, 283 U.S. 359 (1931).

fashioned **Stromberg** theory.[6] On state collateral attack, Parker did not raise the issue at all. In federal district court, Parker confessed that he did not raise the issue of "sufficiency of the evidence" on direct appeal because he never anticipated the issue. As for "**Stromberg**", no mention of that case was made in district court either. Since **Stromberg** was not argued to the district court, no ruling on the **Stromberg** issue was entered there. The first references to either **Stromberg** or its holding, came in Parker's Eleventh Circuit brief. Therefore, the circuit court's decision is correct when it states that the issue is barred for not having been raised. (J.A. 162).

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[6] See Fla.R.App.P. 9.330, (barring the argument of new issues on rehearing).

To circumvent procedural bar problems, Parker seeks refuge in the allegation that the Florida Supreme Court's review of the "entire record" in capital cases means that the court both conjures up and resolves all possible legal (appellate) issues, thus eliminating any subsequent problems with procedural default. In "support" of this untenable position, Parker cites to **Elledge v. State**, 346 So.2d 998 (Fla. 1977). Parker ignores, however, **Brown v. State**, 392 So.2d 1327, 1331 (Fla. 1981), which explained **Elledge** as follows:

> This Court's role after a death sentence has been imposed is "review", a process qualitatively different than "imposition". It consists of two discreet functions. First we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our caselaw . . . The second

> aspect of our review process is to ensure relative proportionality among death sentences . . . Neither of our sentence review functions, it will be noted, involves weighing or re-evaluating the evidence.

Parker's "**Stromberg**" claim has nothing to do with this analysis. Instead, it is a challenge based upon **Stromberg**'s condemnation of general verdicts in highly particularized situations.

In **Stromberg**, a defendant was convicted by general verdict of violating a California law which outlawed the flying of red flags as (1) a political statement, or (2) an invitation to, or (3) stimulus to "anarchistic action". Since (1) was an absolute First Amendment right, it was possible that the "general verdict" convicted Stromberg of a constitutionally protected act. Post-

Stromberg cases also involved laws governing multiple activities, some of which were protected or not illegal.

In this case, Parker was convicted of first degree murder. As the Florida Supreme Court "has repeatedly explained", **Green v. State**, 475 So.2d 235, 236 (Fla. 1985), there is only one crime of "first degree murder". First degree murder is the intentional killing of a human being under §782.04, Fla.Stat., and "intent" is proven by showing either premeditation or the commission of an enumerated felony. Thus, Florida uses the concepts of premeditation and felony-murder as vehicles for proving the same crime, first degree murder.

It is clear that a **Stromberg** analysis, had one been performed, would have answered the question of whether

either "form of murder" was a constitutionally protected activity in the negative.

The only arguable issue, abandoned by Parker, was sufficiency of the evidence under **Jackson v. Virginia, supra**.

Parker would base a **Jackson** claim on the Florida Supreme Court's rejection of a statutory aggravating factor during review of his sentence. Here, again, Parker misinterprets the facts.

The Florida Supreme Court rejected the sentencing factor of "murder during a robbery". That sentencing factor, however, does not cover every kind of "felony murder" or completely prohibit a conviction for "felony murder" (to borrow Parker's term). Under §782.04, Fla.Stat., felony murder would include murders committed while engaged in trafficking drugs or in kidnapping, two

crimes established here. Thus, the mere rejection of "robbery" as an aggravating sentencing factor does not mean that no evidence (guilt phase) of "felony" murder was on the record.[7]

In sum, therefore, it is clear that Parker's claim is not only procedurally barred, it is devoid of legal or factual merit.

The Eleventh Circuit, in declining to review this claim "on the merits", due to its procedurally barred status (J.A. 157, et.seq.), clearly did not err.

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[7] The sentencer may consider evidence of any enumerated felony even if the enumerated felony was not charged as a distinct crime during the "guilt phase". **Ruffin v. State**, 397 So.2d 277 (Fla. 1981); **Brown v. State**, 473 So.2d 1260 (Fla. 1985); **Swafford v. State**, 533 So.2d 270 (Fla. 1988). Also, Florida law permits the finding of a felony murder aggravating factor even if a precise penalty phase jury instruction on the underlying felony is not given. **James v. State**, 455 So.2d 786 (Fla. 1984).

ISSUE III

THE PETITIONER IS NOT ENTITLED TO FEDERAL CREATION OF A "DURESS" DEFENSE TO FIRST DEGREE MURDER FOR THE STATE OF FLORIDA

The State of Florida stands as one of the majority of jurisdictions which does not recognize "duress" as a defense to first degree murder.[8] Even at common law, "duress" was not recognized as a valid defense.[9]

Mr. Parker's contention that Florida recognizes "duress" as a defense to first degree murder, if the theory of the prosecution is "felony murder", is simply not correct.

In **Hawkins v. State**, 436 So.2d 44 (Fla. 1983), the Florida Supreme Court did not adopt the "duress" defense but

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[8] **See** LaFave, **Substantive Criminal Law**, §5.3 (1986).

[9] **Id.**

rather equated Hawkins' claim with the "non-triggerman" defense of **Enmund v. State**, 399 So.2d 1362 (Fla. 1981). Hawkins, a voluntary participant in the underlying crimes, could not allege domination by codefendant Troedel.[10]

In Parker's cited case of **Wright v. State**, 402 So.2d 493 (Fla. 3rd DCA 1981), the lower appellate court explicitly recognized the absence of a "duress" defense to murder even though, in a footnote citing a Michigan case, the court questioned whether "duress" could affect the intent to commit an underlying felony which, in turn, results in a murder. No opinion cn the effect of this "two-step-removed lessened intent" was given.

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[10] Troedel tried to claim domination by Hawkins, which was also rejected. **Troedel v. State**, 462 So.2d 392 (Fla. 1984).

In **Chestnut v. State**, 505 So.2d 1352 (Fla. 1st DCA 1987), the cited discussion appears in a "concurrence and dissent" by a single judge, not in the court's opinion. Even so, citing to **Cawthon v. State**, 382 So.2d 796 (Fla. 1st DCA 1980), and to **Wright v. State**, 402 So.2d 493 (Fla. 3rd DCA 1981), the judge agreed that duress is not a recognized defense to murder in Florida. Even though Judge Ervin was willing to ponder "duress" as a defense to the underlying felony, he wrote:

> Nevertheless, I see no need to decide whether the defense of duress is applicable to the offense of felony-murder, because appellant did not establish, as a precondition to the admissibility of such defense, that the danger to him was either imminent or impending.

Supra, at 1354.

Finally, in **Goodwin v. State**, 405 So.2d 170 (Fla. 1981), the approved "duress" instruction related to a charge of kidnapping, but not to murder. The comment in the **Goodwin** opinion regarding the "duress instruction" does not relate to an instruction on the crime of murder.

Since duress is not a defense to premeditated or to felony murder in Florida (an issue not decided by the Eleventh Circuit), Parker was not entitled to an instruction on "duress".[11]

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[11] The Eleventh Circuit found that even if Florida had a "duress" defense, Parker's proposed instruction was poorly drafted and appeared to set up duress as a defense to premeditated murder as well. Thus, notwithstanding Mr. Parker's general "duress" issue, his specific instruction was improper.

ISSUE IV

THE PETITIONER'S DUE PROCESS RIGHTS WERE NOT VIOLATED BY THE COURT'S DECISION TO ALLOW CROSS EXAMINATION ON THE TOPIC OF "COACHING" BY COUNSEL, DURING A RECESS

Parker states:

> This Court has recognized that under certain circumstances a Defendant in a criminal case has a Sixth Amendment right to consult with counsel during a recess in his trial, even when he is on the witness stand for cross examination. **Geders v. U.S.**, 425 U.S. 80 (1975); **Perry v. Leeke**, 109 S.Ct. 594 (1989).

Petitioner's Brief, p. 47.

In **Geders v. United States**, 425 U.S. 80 (1975), this Court dealt with a court order prohibiting a defendant from consulting with counsel during an overnight recess called while the witness was testifying. While declaring that the defendant had the right to counsel, this Court also held that the

State had the right to cross examine the defendant on the issue of coaching. Thus, Parker's reliance on **Geders** is misplaced.

If Parker's reliance upon **Geders** is misplaced, his citation to **Perry v. Leeke**, 488 U.S. ____, 109 S.Ct. 594, 102 L.Ed.2d 624 (1989), is mystifying.

In **Perry v. Leeke**, this Court held that in a "short recess" case, where the defendant is on the witness stand (and thus "just like any other witness"), the defendant does not have the right to confer with his lawyer. **Perry** contains no restriction on cross examination. It does make clear the fact that no Sixth Amendment rights are implicated in this situation.

Under **Perry**, therefore, Mr. Parker actually received a benefit that the trial court was not required to bestow;

the chance to confer with defense counsel during a short (supper) break in his cross examination.

Mr. Parker suggests that government counsel should be required to proffer some evidence of "coaching" before being allowed to cross examine on that issue. The problem with that proposal is that the State could never make such a proffer because it has no access to attorney-client communications and cannot listen in on their conferences.

Perry recognizes the value of cross examination in determining the truth in criminal cases. **Perry** also recognizes the State's right to conduct a meaningful cross examination. A defendant who takes the witness stand is in the same position as any other witness. If there is no right under the Sixth Amendment to consult with counsel

during said testimony, then clearly there is no Sixth Amendment violation involved in permitting inquiry, on cross examination, into any unprotected consultation with counsel.

CONCLUSION

Mr. Parker has failed to establish any basis for relief from either his convictions or his sentences. The opinion of the Eleventh Circuit should be affirmed in all respects.

Respectfully submitted,

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